Supreme Court, U.S.
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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1995

Barbara J. Turner, Petitioner

v.

Investek Financial Corp., a California Corporation; William H. Trevor; Robert A. Gilmartin; et al, Respondents

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On Petition for a Writ of Certiorari to the Court of Appeal of the State of California First Appellate District

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a state court can refuse to give res judicata effect to a final order of a bankruptcy court issued pursuant to 11 U.S.C { 364.

2. Whether a state court can hold that a bankruptcy trustee can abandon property of a bankruptcy estate to a debtor under 11 U.S.C { 554, while reserving its beneficial legal claims to the estate, in light of this Court's holding in Brown v.O'Keefe (1936) 300 U.S. 518.

LIST OF PARTIES

Barbara J. Turner, Petitioner

vs.

Investek Financial Corp., a California Corporation;William H. Trevor; Robert A. Gilmartin; Misrack, Lipton, Kucera, M.D., Inc., Retirement Trust; North valley Farms Profit Sharing Trust, Barbara Clark, Tim J.Mangansol, Golden West Foreclosure Service, Inc., Does 1-15, inclusive, Respondents.

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ON PETITION FOR A WRIT OF CERTIORARI TO COURT OF APPEAL OF THE STATE OF CALIFORNIA FIRST APPELLATE DISTRICT

Barbara J. Turner respectfully petitions for a writ of certiorari to review the judgment of the Court of Appeal of the State of California, First Appellate District, in this case.

OPINIONS BELOW

The Opinion of the Court of Appeal, First Appellate District (App., infra, 'A') is unreported. The denial of review of the California Supreme Court (App., infra, 'B') is reported. The opinions of the California Superior Court for the County of San Mateo (App., infra, 'C' and 'D') are unreported. The relevant rulings of the Bankruptcy Court (App., infra, 'E', 'F' and 'G') are unreported.

JURISDICTION

The California Court of Appeal entered

its judgment in January of 1996 (App., infra, 'A'). The California Supreme Court denied petitioner's petition for review on April 10, 1996 (App., infra, 'B'). The jurisdiction of this Court is invoked under 28 U.S.C { 1257.

HOW THE FEDERAL QUESTIONS WERE PRESENTED

1. On the issue of the res judicata effect on a state court of a Federal Bankruptcy Court's final order, it was raised by the parties at the trial court level and in the appeal to the California Court of Appeal. At the trial court level this issue was raised via a summary judgment brought by respondents and which was granted. This was pursuant to petitioner's first cause of action in her complaint. (App.,infra, 'C'). The issue was also raised at the trial level via the second and third causes of action in petitioner's complaint. The trial court ruled that the parol evidence rule precluded the admissibility of any evidence deviating from the promissory note's terms. (App., infra, 'D').

This issue was likewise raised and decided by the California Court of Appeal in favor of respondents in its opinion. (App., infra, 'A'). The California Supreme Court denied review. (App., infra, 'B').

2. On the issue of the interpretation by a state court of a federal bankruptcy court's abandonment of property, formerly of the bankruptcy estate, back to the debtor, this issue was likewise raised in the trial court during pretrial motions and trial proceedings.

The issue was likewise raised and decided by the California Court of Appeal in favor of respondents. (App., infra, 'A'). The California Supreme Court denied

review. (App., infra, 'B').

STATEMENT

This is an action originally filed by Petitioner Barbara J. Turner to enjoin a non-judicial trustee's foreclosure sale of her home at 1415 Portola Road in Woodside, California (hereinafter "property"). The action was originally filed on July 12, 1993. Following the San Mateo County Superior Court's denial of petitioner's application for a temporary restraining order, the foreclosure sale was cnducted at 11:00 AM that morning. The sale resulted in a purchase pursuant to a credit bid of $373,587.50 by the beneficiaries who are the respondents herein. Thereafter, petitioner amended her complaint to set aside the sale on the grounds that it was defectively noticed and irregularly conducted, and that the respondents were guilty of fraud by a delivered factual misrepresentation and false promise at the time the loan secured by the deed of trust was made. In addition to seeking relief for a decree setting aside a wrongful foreclosure sale, petitioner reserved her right to make an election for the alternate remedy of damages. The damages alleged were $190,000.00 in general damages as well as punitive damages and attorney's fees by reason of the attorney's fees provision in the promissory note.

A. THE FACTS.

This action concerned a wrongful foreclosure sale of petitioner's home at 1415 Portola Road in Woodside, California. This home ("property") was originally

purchased in 1978 from Holt W. Alden. As a part of the purchase price petitioner gave the seller a $160,000 promissory note secured by a first deed of trust. Following the death of the beneficiary Holt W. Alden, the promissory note and deed of trust was assigned by distribution through probate to Holt M. alden his son. After negotiation with the petitioner in 1988, the maturity date of the note was extended for five more years by the payee to August 1, 1993, at which time a balloon payment for the entire balance due was to be made. At the time of the foreclosure sale on July 12, 1993, the promissory note securing the first deed of trust had an unpaid balance of approximately $130,000.00, more or less.

In September 1989, petitioner filed a Chapter 11 proceeding in the United States Bankruptcy Court in San Jose, California, to seek protection from creditors. Because the property had appreciated and she was in desperate need of funds, she sought a loan to repay certain creditors and deed of trust holders. She negotiated and accepted a loan in the amount of $270,000.00 from Respondent Investek Financial Corporation ("Investek"). Respondent Investek, in addition to being a lender, also acted as a real estate broker in the transaction, and in that capacity had accumulated co-lenders who became co-beneficiaries upon funding of the loan. In actual fact, respondent Investek's claimed contribution of $50,000 to the loan was reduced by immediate reimbursement to it of $24,300.00 in fees.

As a condition of the loan transaction, Investek insisted upon being in second position behind the Alden first deed of trust. Since the property was encumbered by

junior deeds of trust and involuntary liens, the subordination of the junior deed of trust which was not satisfied by the proceeds and the involuntary liens required approval and an order by the Bankruptcy Court under 11 U.S.C. section 364, in order to provide Investek and its co-beneficiaries as lenders priority over the remaining junior deed of trust and the involuntary liens. After hearing the application for approval by petitioner, the bankruptcy court granted an order on April 6, 1990, approving the loan upon the requirement that the interest rate be set at 14% per annum. (App., infra, "E"). No other interest rate was mentioned or allowed in the order. In addition, the bankruptcy court's order granting the loan also required petitioner to subordinate her homestead to the involuntary lien held by judgment creditors Boldt and Runser. (App., infra, "E").

Despite the express terms of the order requiring that interest on the Note be computed at 14%, Investek insisted upon proposed terms increasing the rate to 22% from and after April 1, 1992. The proposed promissory note ("Note") was prepared by Investek itself, which required execution as a condition of close of escrow. Petitioner objected to the terms of the proposed Note prior to signing it at escrow, but she was assured by Investek's president William Trevor, that they had "never enforced the 22% provision in their notes" and "would not enforce this provision against her." Relying on Investek's representations and promise not to enforce the 22% interest provision, as well as upon the primacy of the bankruptcy court order, petitioner

closed the loan transaction on October 15, 1990.

On January 10, 1992, petitioner was able to dismiss her pending Chapter 11 bankruptcy proceeding without a discharge with the relief she had obtained. She then commenced to deal with her creditors without benefit of bankruptcy protection. However, in late March of1992, Respondent Investek notified her that it was insisting upon claiming interest at the rate of 22% commencing April 1, 1992, and proceeded to make demand upon petitioner to pay these sums.

In September of 1992, Investek filed its Notice of Default claiming a delinquency based upon interest at the rate of 22%. Thereafter, on December 28, 1992, it recorded a Notice of Sale which again was based upon a computation of interest at 22%. In the face of the pending foreclosure, petitioner was required to seek bankruptcy court protection on January 27, 1993, with the bankruptcy court in San Francisco, California. In the spring of 1993, during the pendency of the new Chapter 11 proceeding, two possible sales for the property were proposed. But the bankruptcy trustee, upon determining that the sale of the property while in the debtor's estate would obligate trustee for capital gains due to the Internal Revenue Service, instead elected to abandon the property to the petitioner/debtor.

The abandonment occurred on Friday Afternoon, July 9, 1993. (App., infra, "G"). Petitioner filed the lower court action in the San Mateo County Superior

Court on July 12, 1993, and sought a temporary restraining order to prevent the foreclosure sale by Respondent Investek. This restraining order was denied by the superior court. At 11:00 AM Monday morning, ~~July 12, 1993, without any further publica-~~ tion or notice, Respondent Investek, as trustee, conducted the foreclosure sale. There were no outside bidders, and the beneficiary submitted a credit bid of $373,587.50. The bid was based upon interest computed at 22% per annum from April 1, 1992 to the date of sale. In addition, other charges were compounded and included in the credit bid as a result of the increased interest rate.

At the time of the foreclosure sale, the next lien in priority to that of respondent Investek was a judgment lien in favor of judgment creditors Boldt and Runser. That judgment lien has been determined to be non-dischargeable in bankruptcy and constitutes a direct and continuing obligation of the petitioner. It will not be discharged by any ongoing bankruptcy proceeding, and will remain a debt of petitioner.

As a consequence of the foreclosure sale, petitioner not only lost property but remains liable on the Boldt & Runser judgment. Petitioner was prejudiced by the sale in that the inflated notices and the inflated credit chilled bidders, and prevented the realization of excess proceeds which would otherwise have been available to at least partially satisfy the debts remaining to the junior lien holders. Petitioner offered the declaration of Martin T. Egan to show that at least one experienced bidder would have been avail-

able and willing and able to bid on this property if the sale had been properly noticed and the notice had stated the correct amount of the delinquency, but the Superior Court of San Mateo County rejected the declaration on the grounds of hearsay.

Even though the bankruptcy trustee had abandoned the property on July 9, 1993, said trustee still entered into a compromise settlement agreement with respondents with reference to the property on September 23, 1993. This compromise settlement agreement between the trustee and respondents included the purchase of petitioner's claim against respondents as held by the trustee on behalf of the bankruptcy estate.

B. Proceedings Below.

Petitioner's second amended complaint in this superior court contained three causes of action. The first was for equitable relief to set aside the trustee's sale on the ground that it was defective and irregular. The principal ground of the irregularity was that Respondent Investek as trustee wrongfully noticed a default and sale and subsequently bid upon the basis of the 22% interst provision resulting in prejudice and damages to petitioner.

The second cause of action of the second amended complaint alleged that petitioner signed the Note and Deed of Trust only after a promise made without intent to perform by respondents, in that respondents promised petitioner they would not seek to enforce the provision increasing the interest rate to 22% on the promissory note.

The third cause of action alleged a misrepresentation of fact in that the respondents stated that the provision increasing the interest rate to 22%, while a standard term in their notes, had never been enforced in other transactions, which was not true.

On June 16, 1994, respondents made a motion for summary adjudication on the first cause of action. Respondents argued that the sale had been properly noticed in accordance with the terms of the promissory note and that the petitioner had not been prejudiced or damaged. The San Mateo Superior Court ruled that the trustee's sale was "duly noticed, complied with all statutory requirements, and had no defects." Moreover, the court ruled that even if defects were claimed in the sale process, "they were irrelevant as [petitioner] had not been damaged thereby because she had no equity in the property." (App., infra, "C"). Petitioner argued in opposition that the sale was defective because of its violation of the terms of the bankruptcy court orders and the primacy of federal law. In addition, petitioner argued that she had in fact been damaged and supported these argumetns with counter-declarations and judicially noticed material to raise triable issues of fact.

The case then proceeded to trial on November 1, 1994, on the second and third causes of action. The superior court, with the assistance of counsel, reviewed the prospective course of evidence to be presented. It further determined, again with the cooperation and assistance of

counsel, that an essential issue was the admissibility of oral evidence of respondents' fraudulent misrepresentations and false promise. Since respondents proposed a parol evidence objection to such evidence, the superior court conducted a hearing in the nature of a bifurcated trial of a single issue regarding the admissibility of the oral evidence of respondents' fraud, or in the nature of a hearing pursuant to California Evidence Code section 402(b).

The trial proceeded with evidence being presented by both petitioner and respondents. The trial judge ruled that the oral testimony regarding the respondents' promise and misrepresentation was barred by the parol evidence rule objection stated by the respondents.

In response to argument on the evidence before the trial court, the court determined that the Note constituted an integration of the final and total expression of the agreement of the parties. Based on that ruling the trial judge then determined that the oral testimony regarding the respondents' promise and misrepresentation constituting fraud as alleged in the second and third causes of action was barred by the parol evidence objection stated by the respondents.

Judgment was entered in the superior court on November 28, 1994. (App., infra, "D"). Petitioner's motion for a new trial and/or an order vacating the judgment was filed on December 13, 1994 and denied on January 23, 1995. A notice of appeal to the California Court of Appeal, the First District, was filed on February 22, 1995.

The California Court of Appeal affirmed

the judgment entered against petitioner in January of 1996. (App., infra, "A"). In regards to the issue of petitioner's action to set aside the foreclosure sale, the Court of Appeal noted that when petitioner filed her second bankruptcy all of her assets, including whatever legal claims petitioner may have had against Respondent Investek arising out of the Note, became assets of the bankruptcy estate pursuant to 11 U.S.C { 541(a)(1). The reviewing court also noted that even though the bankruptcy trustee thereafter abandoned the property to petitioner, "he was careful to retain the legal claims against Investek." (App., infra, "A"). Then when this underlying state action was pending,

> the trustee entered into a settlement agreement with Investek and released it from "any and all past, present, or future claims, demands, obligations, or causes of action, whether based in tort, contract, or other theories of recovery, including but not limited to, all of the aspects relating to the Loan between Investek and [petitioner], specifically, the validity of the loan origination, the validity of the terms of the Promissory Note, the validity of the default, and the validity of the ultimate foreclosure proceedings through the time of the [trustee's] abandonment of the securing Property..." Thus, as the trial court correctly recognized, [petitioner] did not have the

> right to set aside the foreclosure sale because her legal grounds for doing so, the claims that arose because of the conflict between Investek's note and the prior bankruptcy court order, had been retained by the bankruptcy trustee and were released in the settlement agreement. That settlement agreement was then approved by the bankruptcy court. In essence, [petitioner's] legal claims no longer existed. We conclude the court correctly granted Investek summary adjudication on the cause of action seeking to set aside the foreclosure sale. There was no error.

(App., infra, "A", p.4)

As far as petitioner's second and third casues of action against respondents for fraud regarding the foreclosure sale, the Court of Appeal held that the trial court was correct in ruling that California's parol evidence rule precluded petitioner from introducing any evidence which deviated from teh terms of the Note. In so doing, the Court of Appeal relied principally on the California Supreme Court case of Bank of America etc. Assn. v. Pendergrass (1935) 4 Cal.2d 258. (App., infra, "A", pg. 5).

The Court of Appeal's opinion affirmed the judgment of the trial court, the San Mateo County Superior Court, in its entirety. (App., infra, "A", p.6) Petitioner filed a petition for review to the

California supreme Court. On April 10, 1996, that Court denied the petition to review. (App., infra, "B").

REASONS FOR GRANTING THE PETITION

This case presents a conflict between the California Court of Appeal, (and the California Supreme Court since that court denied petitioner's petition for review), and this United States Supreme Court on the issue of the res judicata effect of a federal bankruptcy court order on a state court. (Stoll v. Gottlieb (1938) 305 U.S. 165, 167, 170-172.) As such there is a strong reason for granting this writ of certiorari. (See Hudson v. Louisiana (1981) 450 U.S. 40, 42; William E. Arnold Co. v. Carpenters District Council (1974) 417 U.S. 12, 14; Pittsburg v. Alco Parking Corp. (1974) 417 U.S. 369, 371-372.) Likewise, this case represents a conflict between the above-referenced state courts and this United States Supreme Court on the issue of the powers and duties of a bankruptcy trustee after abandoning property, formerly of the bankrupty estate, back to the debtor. (Brown v. O'Keefe (1936) 300 U.S. 598, 602.) As such, this is another strong reason for granting this writ of certiorari.(See Hudson, supra; William E. Arnold Co., supra; Pittsburg, supra.)

Additionally, this Court has held that the granting of a writ of certiorari was appropriate where, as here, state court decisions involving the construction and application of federal statutes involve sufficiently important issues.(Kolovrat v. Oregon (1961) 366 U.S. 187, 191.) Additionally, this Court has granted certiorari

where, as in this case, it was important to determine whether a state has properly interpreted, applied, or extended a prior United States Supreme Court decision in a given situation. (See Bullington v. Missouri (1981) 451 U.S. 430, 432; Republic Steel Corp. v. Maddox (1965) 379 U.S. 650, 652; Oregon v. Mathiason (1977) 429 U.S. 492, 493; Hankerson v. North Carolina (1977) 432 U.S. 233, 240.)

Moreover,this Court has granted certiorari where the underlying state court decision seems "to present important questions touching the accomodation of state and federal interests under the constitution. (Kosydar v.National Cash Register Co. (1974) 417 U.S. 62, 65; Smith v. United States (1977) 431 U.S. 291, 293; Arizona v. Manypenny (1981) 451 U.S. 232, 239.)

Since this case involves the interpretation and effect given to a federal statute and a federal bankruptcy court's order by a state court, it involves sufficiently important issues for certiorari. Especially since the interpretation and effect thereof by the state court conflicts with decisions by the United States Supreme Court.

I. THE STATE'S FAILURE TO GIVE RES JUDICATA EFFECT TO THE BANKRUPTCY COURT'S ORDER ALLOWING ONLY 14% INTEREST ON RESPONDENTS' LOAN TO PETITIONER CONFLICTS WITH UNITED STATES SUPREME COURT PRECEDENT.

Petitioner had filed a Chapter 11 proceeding in the bankruptcy court in September of 1989 and continued as a debtor in possession until the proceeding was dis-

missed on January 10, 1992. Hence, at all times relevant to the creation of the loan transaction between petitioner and respondents which was the subject of the underlying state action, petitioner was a "debtor in possession" and acting as such under the jurisdiction of the bankruptcy court. Under 11 U.S.C. {1107(a), petitioner as debtor in possession only had the capacity and powers of a trustee.

When the bankruptcy petition was filed it created a bankruptcy "estate." (11 U.S.C. { 541.) The estate included all "legal and equitable interest of the debtor in property as of the commencement of the case" and therefore it included the residential property of the petitioner at 1415 Portola Road in Woodside, California. (11 U.S.C. {541(a)(1). 28 U.S.C. {1471(e) provides that the bankruptcy court shall have exclusive jurisdiction of all the property, wherever located, of the debtor as of the commencement of the case. (Miller v.RKA Management Corp. (1979) 99 Cal.App.3d 460, 468.) Thus, at all relevant times concerning the loan transaction between petitioner and respondents, petitioner was a "debtor in possession" dealing with property of the bankruptcy estate which had been established when she filed her petition in bankruptcy in September of 1989. She was at all times under the exclusive jurisdiction of the United States Bankruptcy Court when dealing with the respondents. (28 U.S.C. { 1471; USA v.Carolina Parachute ( ) 90 F.2d 1469-1474; Miller v. RKA Management Corp. (1979) 99 Cal.App.3d 460.)

Once the bankruptcy petition is filed,

title to petitioner's property passed by operation of law to the estate. (11 U.S.C. { 541.) Even though she was a "debtor in possession" and conducting her financial affairs rather than a trustee, her rights and powers and duties as a debtor in possession were strictly limited. The powers of a debtor in possession are "subject to any limitations on the trustee serving in a case under this chapter."(11 U.S.C. { 1107(a).) The duties and powers of a trustee are limited pursuant to 11 U.S.C. {{ 363, 364 in relating to the sale, use, or lease of estate property, and to obtaining credit. In petitioner's case the application for the loan approval at a noticed hearing and the bankruptcy court's subsequent order thereon strictly controlled her rights to deal with the estate property with regard to respondents. (See App., infra, "E", "F".) Consequently, at all times petitioner was dealing with respondents only in her capacity as a dentor in possession and was strictly limited by the application of the powers of a trustee under the United States Bankruptcy Code.

Petitioner, as debtor in possession, was only authorized to incur a loan in accordance with the terms of the bankruptcy court order.(See App., infra, "E", "F"). Since the trustee (and debtor in possession) is a creature of statute, she had only those powers conferred thereby.(11 U.S.C. {1107; In re Barry ( ) 29 Bankruptcy Reporer 754, 760; Local Joint Executive Board v. Hotel Circle (1980) 613 F.2d 210.) Accordingly, when the loan transaction was authorized and completed, petitioner could only be obligated and bound by the interest rate charge of 14%. Any additional interest

rate charges contained in the Note and Deed of Trust were mere surplusage since they were directly contrary to the explicit terms of the bankruptcy court order entered on April 6, 1990. (See App., infra, "E".)

The bankruptcy court orders of April 6, 1990 (App., infra, "E" and "F") are final orders. Under federal law a judgment or order once rendered is final for purposes of res judicata until reversed or modified on appeal or set aside in a court of rendition. (Stoll v. Gottlieb (1938) 305 U.S. 165, 179-171.) Full faith and credit must be given a final order or judgment of a federal court and it is thus binding on state courts. (Levy v.Cohen (1977) 19 Cal. 3d 165, 173.) Consequently, at petitioner's trial, the San Mateo County Superior Court was bound by its duty to give the bankruptcy court orders full faith and credit to make a finding that the loan transaction terms were as stated in those orders and that the promissory note and deed of trust could therefore not have constituted an integrated agreement. Respondents' only remedy to correct the terms of the Note would have been to ask the original bankruptcy court to revise the terms of its order. If necessary, the bankruptcy court could have retroactively voided a transaction where the trustee had acted without authority. (Local Joint, supra, at 217; In re Willow Cafeterias (1940) 111 F.2d 429, 431.)

However, such was not the case. The state trial court refused to give res judicata effect to these bankruptcy court orders and ruled that the fact that respondents were charging more interest

than the bankruptcy court order allowed, did not constitute fraud or make the foreclosure sale defective. (See App., infra, "C" and "D".) The state reviewing courts agreed.(See App., infra, "A", "B".) The state courts failed to properly interpret, apply, or extend this Court's decision on the applicability of res judicata to federal bankruptcy court decisions in Stoll v.Gottlieb (1938) 305 U.S. 165, 170-171. Hence certiorari should be granted. (See Bullington v. Missouri (1981) 451 U.S. 430, 432; Republic Steel Corp. v. Maddox (1965) 379 U.S. 650, 652; Oregon v. Mathiason (1977) 429 U.S. 492, 493; Hankerson v. North Carolina (1977) 432 U.S. 233, 240.)

Additionally, there is a conflict between the decision of the California Supreme Court, in denying review of the California Court of Appeal's decision, and the United States Supreme Court on a matter of federal law. (See Hudson v. Louisiana (1981) 450 U.S. 40, 42; William E. Arnold Co. v.Carpenters District Council (1974) 417 U.S. 12, 14; Pittsburg v.Alco Parking Corp. (1974) 417 U.S. 369, 371-372.

II. THE STATE COURT'S HOLDING THAT A BANKRUPTCY TRUSTEE CAN ABANDON PROPERTY OF THE ESTATE TO A DEBTOR UNDER 11 U.S.C.{ 554, WHILE RESERVING ITS BENEFICIAL LEGAL CLAIMS TO THE ESTATE, CONFLICTS WITH UNITED STATES SUPREME COURT PRECEDENT.

Because of the primacy of federal law, the exclusive jurisdiction of the bankruptcy court, and the specific terms of the bankruptcy court order limiting interest on the loan to 14%, the finding in the state court of summary adjudication that the

foreclosure sale (based on 22% interest) was "duly noticed, complied with all statutory requirements, and had no defects," was clearly erroneous. (App., infra, "E", "F".) Apparently the trial court was influenced by the bankruptcy court's July 9, 1993 order of abandonment of the property in question. (App., infra, "G".) However, the abandonment order cannot be used to support the trial court's ruling. This order was made before the foreclosure began and made no reference or finding of any kind about the propriety or sufficiency of the state court foreclosure proceedings.

The petitioner's home was abandoned by the trustee on July 9, 1993, pursuant to this order.The effect of abandonment was to remove the asset from the bankruptcy estate and return it to the debtor. As a consequence, it is treated as if it had never been in the bankruptcy estate. (Brown v.O'Keefe (1936) 300 U.S. 598, 602; Mason v. CIR (1980) 646 F.2d 1309, 1310.) As the Mason court noted in reference to the Brown case,

> When the court grants a trustee's petition to abandon property in a bankruptcy estate, any title that was vested in the trustee is extinguished, and the title reverts to the bankrupt...The bankrupt is treated as having owned it continuously. (Id. at 1310.)

Since the property is treated as if it was never in petitioner's bankruptcy proceeding filed January 27, 1993, all of the acts related to the property at that

point in time are to be governed by state law. Thus, the lower court's finding that the trustee's sale "had no defects" cannot be supported by the bankruptcy court's order of July 9, 1993.

Moreover, the wrongful act alleged in petitioner's second amended complaint was the actual conduct of the sale on July 12, 1993, (three days after the property was abandoned by the bankrupty trustee), pursuant to improper notices, including the notice of default and the notice of sale. Thus the wrongful notices of default, notice of sale, and the wrongful foreclosure sale all occurred outside the bankruptcy proceeding. Consequently, the matter had to be treated under state law, and it remains the exclusive jurisdiction of the state courts.

The respondents contend that their compromise with the bankruptcy trustee as evidenced in its bankruptcy order of September 23, 1993 includes the purchase of petitioner's claim against the respondents as held by the trustee on behalf of the bankruptcy estate. This contention is irrelevant since respondents' wrongful acts in conducting the sale occurred <u>after</u> the abandonment. Furthermore, it makes no logical sense that the trustee could abandon an asset and then compromise the claim of the debtor to whom the property was released by selling rights to a creditor intricately tied up with the creditor's security interest. Such a purported severance of the petitioner's rights, in addition to being chronologically irrelevant because the foreclosure sale was held subsequent to the abandonment, is also logically

insupportable. (See Brown v.O'Keefe (1936) 300 U.S. 598, 602-603.)

A summary adjudication can only be granted if there is no question of fact raised. Very clearly, the irregular procedures and the overstatement of the sums due (14% versus 22% interest), constituted a disputed material fact sufficient to overcome summary adjudication. Hence, the state courts' decisions are erroneous.

They are erroneous in that they conflict with this Court's precedent on the issue of abandonment under 11 U.S.C. { 554. When property is abandoned, any interest in said property by the trustee is extinguished and the bankrupt is treated as having owned the property continuously. (Brown, supra, at 602-603; Mason v.CIR (1980) 646 F.2d 1309, 1310.) Therefore, the bankruptcy court, after abandonment, could not compromise the petitioner's claims of irregularity against the respondents. It was error for state court to so hold.

Thus a conflict between the state courts and this Court's decision in Brown exists and certiorari should be granted. Additionally, the state courts failed to properly interpret a prior decision by this Court. In both situations, certiorari should be granted. (See Bullington v.Missouri (1981) 451 U.S. 430, 432; Republic Steel Corp. v. Maddox (1965) 379 U.S. 650,652; Oregon v. Mathiason (1977) 429 U.S. 492, 493;Hankerson v. North Carolina (1977) 432 U.S. 233, 240; Hudson v.Louisiana (1981) 450 U.S. 40, 42; William E. Arnold Co. v. Carpenters District Council (1974) 417 U.S. 12, 13;

Pittsburg v.Alco Parking Corp. (1974) 417 U.S. 369, 371-372.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

July 9, 1996

Respectfully submitted,

Barbara J. Turner

Barbara J. Turner, pro se

APPENDIXES

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, FIRST APPELLATE DISTRICT
DIVISION FIVE

January 10, 1996

BARBARA J. TURNER
Appellant
v.
INVESTEK FINANCIAL CORP;WILLIAM H. TREVOR; ROBERT A. GILMARTIN et al.
Appellees

From the San Mateo Superior Court
No. 384247
Honorable Dale A. Hahn, Judge

Barbara J. Turner appeals from a judgment entered after the trial court granted the motion for nonsuit of respondents Investek Financial Corporation (Investek). She claims the judgment must be reversed because (1) the court had, prior to trial, erroneously granted summmary adjudication on one of her causes of action; (2) the nonsuit ruling, which was premised upon an earlier decision holding the parol evidence rule applicable,waslegally incorrect; (3) the court erroneously denied her motion for a new trial. We will reject these arguments and affirm the judgment in every respect.

I. FACTUAL AND PROCEDURAL BACKGROUND

This appeal involves appellant's efforts to evade foreclosure on real property she owned located on Portola Road in Woodside.

Appellant owned the property since 1978 subject to a note and deed of trust in

favor of the original seller. She was unable to satisfy this or other liens against the proeprty; so in September 1989, she filed a petition under chapter 11 of the Bankruptcy Code. Appellant hoped to refinance her debts so, acting as debtor-in-possession, she contacted Investek to obtain a loan. Investek agreed, and it sent appellant a committment letter offering $300,000 at 14 percent interest the first year and 22 percent thereafter. Appellant asked the bankruptcy court to approve the loan and to grant Investek priority over existing liens as is permitted by the Bankruptcy Code (See 11 U.S.C. { 364(d).) The Court agreed, and ot authorized appellant to obtain a 14 percent loan. Appellant then completed the transaction by borrowing $270,000 from Investek secured by a deed of trust in second position. The terems of the associated promissory note complied with the terms Investek had offered in its committment letter rather than the terms authorized by the bankruptcy coury, i.e., an initial interest rate of 14 percent that increased to 22 percent instead of a flat 14 percent rate.

Appellant's creditors forced her to convert the bankruptcy from a chapter 11 proceeding to a chapter 7 proceeding. Thereafter, appellant sought and received an order dismissing the bankruptcy unconditionally.

Appellant then tried to renegotiate her debts. She was unsuccessful; and on September 24, 1992, Investek filed a notice of default under its deed of trust, while on December 28, 1992, it executed a notice of sale. Appellant responded by filing a new

chapter 11 proceeding to stay the foreclosure proceedings. Several months later, the bankruptcy court lifted the stay and allowed Investek to go forward with its foreclosure. The trustee who had been appointed to manage the bankruptcy estate decided to abandon the property to appellant, and not to contest the foreclosure because the property was was worth less than the sum total of the liens against it. However, while abandoning the property itself, the trustee was careful to reserve any legal claims which might exist against Investek due to the fact that Investek's loan did not comply with with the bankruptcy court order. The foreclosure went forward on July 12, 1993, adn Investek purchased the property with a credit bid.

Appellant then filed the present suit against Investek, alleging three causes of action. The first sought to set aside the trustee sale becuase the terms of Investek's note did not comply with the prior bankruptcy court order. As a result, appellant alleged, the notice of default and notice of sale were defective because they overstated the amount due. The second and third causes of action were based on fraud theory. Appellant said that before she signed the promissory note, Investek told her it would not enforce the 22 percent interest rate and that it had never done soin the past.

While the present state action was pending, the trustee of the bankruptcy estate entered into an agreement with Investek to settle the claims that had been reserved.In exchange for Investek's payment of $10,000, the trustee released Investek from any and

all past, present, or future legal claims that may have existed because of the loan. The bankruptcy court then approved the settlement and the trustee's decision to release Investek from further claims.

Now armed with a release, Investek moved for summary adjudication on the first cause of action, arguing that whatever claims appellant may have had arising out of the loan had been extinguished. The trial court agreed and granted the motion. The case then proceeded to trial on the remaining two causes of ation for fraud. As the trial was beginning, the court conducted a hearing to determine whether the statements Investek had allegedly made to appellant about the loan terms were admissible under the parol evidence rule. The court concluded the parol evidence rule was applicable, and ruled appellant could not present any evidence that would contradict the express terms set forth in the promissory note or deed of trust. Faced with this ruling, appellant admitted she lacked evidence sufficient to support her causes of action for fraud, so the trial court granted Investek's motion for a nonsuit.

Afrer the court entered a judgment in favor of Investek, appellant moved for a new trial arguing the parol evidence rule was legally incorrect. When the trial court denied the motion, appellant filed the present appeal.

II. DISCUSSION

A. Action to Set aside the Foreclosure Sale

Appellant claims the trial court erred when it granted summary adjudication on her

cause of action seeking to set aside the foreclosure sale. She advances a complex argument that is based on events occurring during the first bankruptcy (primarily the conflict between the bankruptcy court order and the terms of Investek's note), and argues summary adjudication was inappropriate because there was a triable issue of fact about whether the foreclosure should be set aside. We need not address these arguments directly because they ignore the critical effect of the event that occurred during the second bankruptcy. Appellant implicitly concedes that when she filed her second bankruptcy, all of her assets, including whatever legal claims she may have had against Investek arising out of the note, became assets of the bankruptcy estate. (See 11U.S.C. { 541(a))1).) While the trustee who was appointed to administer the estate thereafter abandoned the real property to appellant, he was careful to retain the legal claims against Investek. Then while the current action was pending the trustee entered into a settlement agreement with Investek and releaseed it from "any and all past, present, or future claims, demands, obligations, or causes of action, whether based on tort, contract, or other theories of recovery, including,but not limited to, all aspects relating to the Loan between Investek and [appellant],... specifically, the validity of the loan origination, the validity of the default, and the validity of the ultimate foreclosure proceedings through the time of [the trustee's] abandonment of the securing Real Property..." thus, as the trial court correctly recognized, appellant did not have the right to set aside the foreclosure sale because her legal grounds for

doing so, the claims that arose because of the conflict between Investek's note and the prior bankruptcy court order, had been retained by the bankruptcy trustee and were released in the settlement agreement. That settlement agreement was then approved by the bankruptcy court. In essence, appellant's legal claims no longer existed. We conclude the court correctly granted Investek summary adjudication on the cause of action seeking to set aside the foreclosure. There was no error.

B. PAROL EVIDENCE

The second and third causes of action for fraud were based on statements Investek allegedly made to appellant shortly before she signed the promissory note. Appellant said Investek told her that it would not enforce the 22 percent interest rate set forth in the note, and that it had never done so in the past. The trial court ruled that these statements were inadmissible under the parol evidence rule. Appellant now challenges this ruling; however, we believe that the trial court was correct. Our Supreme Court set forth the controlling principles 60 years ago in Bank of America etc. Assn. v. Pendergrass (1935) 4 Cal.2d 258 (Pendergrass), a case very similar to the present one. At issue in Pendergrass was a promissory note that, by its terms, was payable on demand. The plaintiffs sought to prove that the bank orally promised, without any intention of honoring the promise, that "they would not be required to 'make any payments on their indebtedness, either interest or principal, until this money came in from their 1932 crop of lettuce seed...'" (Id. at p. 263.) The court held

the parol evidence rule precluded proof of the alleged promissory fraud:"Our conception of the rule is that it must tend to establish some independent fact or representation, some fraud in the procurement of the instrument or some breach of confidence concerning its use, and not a promise directly at variance with the promise of the writing." (Ibid. italics added.)

In the following years, the courts have followed the mandate of Pendergrass repeatly; and ruled that if an allegedly false promise relates to matters covered by the main agreement and contradicts or varies the terms thereof, the parol evidence rule applies and the evidence is inadmissible. (See Bank of America v. Lamb Finance Co. (1960) 179 Cal.App.2d 498, 502-503; Price v.Wells Fargo Bank (1989) 213 Cal.App.3d 465, 484-486 (per Newsome,J.); Alling v. Universal Manufacturing Corp. (1992) 5 Cal.App.4th 1412, 1436-1437 (per Merrill, J.).

Here, appellant based her fraud causes of action on two statements allegedly made by Investek: first, that it would not enforce the 22 percent interest rate; and second, that it had never done so in the past. The first of these clearly contradicted the express terms of the promissory note calling for a 22 percent interest rate and thus was inadmissible under Pendergrass. The second is somewhat more problematical. Appellant has never explained how Investek's statement can be interpreted as a false promise. It appears she is arguing that Investek was making some sort of implied promise that it would not enforce 22 percent rate against her as well. However, such interpretation

would directly contradict the terms of the deed of trust that authorized Investek to foreclose if appellant filed to satisfy her obligations under the note. The second statement was also inadmissible under Pendergrass.We conclude the trial court correctly ruled the alleged statements were inadmissible under the parol evidence rule.

C. NEW TRIAL

Appellant claims the trial court erred when it denied her motion for a new trial; however, in advancing this argument, she relies on the same legal principles we have discussed above. since we have rejected those arguments, we reject her challenge to the new trial ruling as well.

III. DISPOSITION

The judgment is affirmed.

s/_____
Peterson, P.J.

WE CONCUR:

s/_____
King, J.

s/_____
Haning, J.

B

IN THE SUPREME COURT OF CALIFORNIA
S052015

April 10, 1996

First Appellate District, Division Five
A069027

BARBARA J. TURNER, Appellant

v.

INVESTEK FINANCIAL CORP. Et Al.,
Respondents

Appellant's petition for review DENIED.

s/ _____
Lucas, Chief Judge

IN THE SUPERIOR COURT OF CALIFORNIA
IN AND FOR THE COUNTY OF SAN MATEO

Case No. 384247
August 25, 1994

BARBARA J. TURNER, Plaintiff
v.

INVESTEK FINANCIAL CORP., WILLIAM H. TREVOR; ROBERT A. GILMARTIN et al.,
Defendants

FINDINGS AND ORDER AFTER HEARING

The matter came on regularly for hearing oon August 3, 1994,before the Honorable Margaret Kemp, Judge of the Superior Court. Present in Court and representing Plaintiff was Mr. James Little. Representing Defendants and moving parties was David Jay Morgan, Inc., Brian W. Evans appearing.

The matter having been fully briefed and argued and the Court having considered the pleadings, exhibits and all documents on file herewith, the Court finds:

Judge Dennis Montali, Bankruptcy Judge for the Northern District of California, abandoned the real property commonly known as 1415 Portola Road, Woodside, California on 9 July 1993, to the bankrupt. He specifically reserved whatever causes of action may have existed against Defendants herein by virtue of the terms of the note, any usury cause of action that the bankrupt may have and any alleged defects in the notice of sale of the foreclosed property.

Pursuant to that order, Defendants herein

entered into a valid compromise of claims with the Trustee in bankruptcy on 23 September 1993, under and by virtue of which all of the claims that the Trustee in bankruptcy had reserved were forever settled adn compromised, and no longer retained as contested claims. This was done on 23 September 1993.

On 12 July 1993, a trustee sale took place following the order of the Bankruptcy Court on 9 July 1993. That trustee sale was duly noticed, complied with all statutory requirements and had no defects.

On 12 July 1993, and for a very substantial time previous thereto, the liens and encumbrances of record for Plaintiff's property greatly exceeded the fair market value of that property, leaving Plaintiff no equity whatsoever.

Because Plaintiff had no equity in the property, and wouldnot have received any personal benefit from the foreclosure sale, any defects that she claimed existed are irrelevant as Plaintiff has not been damaged thereby.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

1. That Defendants' motion for summary adjudication is granted and said cause of action is hereby dismissed.

s/_____
Margaret J. Kemp, Judge of
the Superior Court

IN THE SUPERIOR COURT OF CALIFORNIA
IN AND FOR THE COUNTY OF SAN MATEO

Case No. 384247
November 28, 1994

BARBARA J. TURNER, Plaintiff
v.

INVESTEK FINANCIAL CORP., WILLIAM H. TREVOR; ROBERT A. GILMARTIN et al.,
Defendants

JUDGMENT

This matter came on regularly before me for trial on 2, 3 and 4 November 1994. Plaintiff appeared in person and was represented by James B. Little, Esq. Defendants appeared and were represented by David Jay Morgan, Esq.

The court, on its own motion, made an order bifurcating the trial, the first phase to be the question of liability under the Second and Third Causes of Action of Plaintiff's Second Amended Complaint, and the second, if necessary, for damages.

The court further ordered a hearing outside of the presence of the jury, which was both a hearing under Evidence Code Section 402(b) and a further bifurcation of the trial, to determine if Plaintiff would be permitted to introduce evidence to alter the terms of the promissory note and deed of trust executed by the Plaintiff adn defendants, or whether such evidence would be barred by the Parol Evidence Rule. Evidence, both oral and documentary, was received. The parties argued the matter

before the court, and the court being fully advised in the premises ruled that Defendant's objections to the introduction of evidence, which would vary the terms of the promissory note and deed of trust, should not be admitted under the Parol Evidence Rule.

Based upon this ruling, Plaintiff admitted that she would not have any further evidence available to her (which would not be subject to a proper objection under the Parol Evidence Rule) which would substantiate any of the allegations contained in the Second and Third Causes of Action.

Based upon this stipulation, it was further stipulated that the court need not impanel a jury, that Plaintiff would, by offer of proof, present her opening statement, and Defendants would object thereto based upon the Parol Evidence Rule.

Each of the objections of Defendants was sustained by the court. Thereafter, Defendants brought a motion for a non-suit on the grounds that there was no evidence which would show a promise made without intent to perform, and that there was no evidence of a false representation. These motions for non-suit as to the second and Third Causes of Action were granted.

Based upon the foregoing, and the prior granting of Defendants' motion for summary adjudication as to the First Cause of Action,

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED as follows:

1. That judgment be entered in favor of Defendants Investek Financial Corp., a California Corporation; William H. trevor; Robert A. Gilmartin; Misrack, Lipton, Kucera, M.D., Inc. Retirement Trust; North Valley Farms Profit Sharing Trust, Barbara Clark, David Cavan, Tim J. Mansagol, Golden West Foreclosure Service, Inc., et al,. and against Plaintiff Barbara J. Turner, and that Plaintiff take nothing by reason of her Second Amended Complaint on file herein;

2. That Defendants are awarded cost of suit and attorneys' fees;

3. That the lis pendens, which was recorded on July 12, 1993, is ordered expunged pursuant to Code of Civil Procedure Section 405.32.

Dated: November 21, 1994

s/_____
Dale A. Hahn, Judge of the Superior Court

IN THE UNITED STATES BANKRUPTCY COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. 589 04266 JRG

April 6, 1990

In re: BARBARA JEAN TURNER, INDIVIDUALLY AND AS A PRINCIPAL OF 551 LYTTON AVENUE ASSOCIATES, A CALIFORNIA LIMITED PARTNERSHIP, Debtor

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ORDER GRANTING DEBTOR'S MOTION TO INCUR DEBT

Debtor's motion to incur superpriority debt came on regularly for hearing on March 14, 1990, before the Honorable James B. Grube, United States Bankruptcy Judge. Patric J. Kelly, Esq., and Duane W. Shewage, Esq., of Adleson, Hess, Christensen & Kelly, appeared for secured creditors John R. Boldt and Barbara Runser (herein secured creditors). Stanley A. Zlotoff, Esq., appeared on behalf of the debtor, Barbara Jean Turner who was present in Court. There was no appearance by or on behalf of the U.S. Trustee.

After hearing the argument of counsel, reviewing the matters on file herein, and good cause appearing,

IT IS HEREBY ORDERED, that debtor's motion to incur debt not to exceed $270,000.00 to be secured by debtor's real property located at 1415 Portola Road, Woodside, California (hereinafter the "subject property") is granted upon the following conditions to which debtor stipulated:

1. The terms of the loan shall be substantially as represented by debtor in her moving papers, including but not limited to, that the principal amount of the new debt shall not exceed $270,000 secured by a second deed of trust; that the loan fee shall be nine percent (9%) of the principal amount of the loan, approximately $24,300; that the new lender shall retain a reserve for pre-paid interest for eight months of approximately $25,200; and that title and escrow costs shall be approximately $1350.

2. Arrearages on the current first deed of trust shall be cured;

3. The real property taxes due and owing, and the second, third, and fourth deeds of trust shall be paid off and these deeds of trust reconveyed; this order is conditioned on Wells Fargo Bank accepting $60,000 in full and complete satisfaction of its lien secured by the subject property (discounting approximately $42,000 in interest.)

4.The new debt shall be secured by a second deed of trust subordinate only to the first deed of trust currently secured by the subject property in which Holt M. Alden is the beneficiary and specifically the debt shall be senior to all liens of Barbara Runser, John Boldt, Robert Goudy, and Bernard Benz.

5. Upon consummating the above-mentioned refinancing, $45,000 of the debtor's $75,000 homestead exemption shall be subordinated to the judgment lien of secured creditors Barbara Runser and John Boldt; debtor has represented that $30,000 of her homestead expemption has been assigned to Highlands Insurance Company in obtaining

her $25,000 "appeal and stay of execution" bond filed with the Superior Court of San Mateo County.

6. The above-mentioned $25,000 bond shall be further security for secured creditors' judgment in this Court, adn that in the event secured creditors are unable to satisfy their judgment lien from teh subject property, the proceeds from, the bond up to $25,000 shall be payable to satisfy any deficiency. Debtor shall do whatever is necessary to effectuate the foregoing.

7. Debtor shall pay one-half of the monthly payment on the new debt from her own funds, as opposed to the pre-paid interest impound for the first sevenmonths and thereafter be-ginning with the eighth month, she shall pay from her funds the full monthly payment of said new debt. Failure to make such a payment, irrespective of whether such failure is a default to the lender, shall be deemed a violation of this order and may entitle secured parties or any other party in interest to request other appropriate relief, including, but not limited to, converting debtor's chapter 11 bankruptcy to a chapter 7 bankruptcy, the appointing of a trustee, or such other relief as may be appropriate.

Secured creditors may bring a motion for the appointment of an examiner upon ten (10) days notice to debtor.

Secured creditors' oral application for a stay of this order pending appeal is denied.

Dated: April 6, 1990

s/_____
Honorable James R. Grube, Judge,
United States Bankruptcy Court

IN THE UNITED STATES BANKRUPTCY COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. 589 04266 JRG

July 2, 1990

In re: BARBARA JEAN TURNER, INDIVIDUALLY AND AS A PRINCIPAL OF 551 LYTTON AVENUE ASSOCIATES, A CALIFORNIA LIMITED PARTNERSHIP, Debtor

---

ORDER GRANTING MOTION TO INCUR SUPERPRIORITY DEBT

The debtor's motion having come on for hearing on May 30, 1990, and good cause appearing,

IT IS HEREBY ORDERED that the debtor has the court's authority to incur a debt secured by the real property located at 1415 Portola Road, Woodside, California, that the terms and conditions of the debt shall be the same as those set forth in the order of the court entered on April 6, 1990, and that the debt shall be senior to the following liens:

1. The deeds of trust recorded on August 7, 1989 and August 28, 1989 in favor of J. Leland Johnson;

2. The abstract of judgment recorded on November 29, 1989 in favor of Credit Bureau of Palo Alto, Inc.;

3. The claim of lien recorded on February 21, 1990 in favor of J & M Termite Control;

4. All escrow closing documents cncerning the above referenced debt shall be delivered to the law office of Adleson, Hess, Christensen & Kelly and to the law office of Leland Johnson at least three business days before closing.

Dated: July 2, 1990

s/_____
James R. Grube, Bankruptcy Judge

IN THE UNITED STATES BANKRUPTCY COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. 93 30392 T DM

July 9, 1993

In re: BARBARA JEAN TURNER, Debtor

ORDER AUTHORIZING ABANDONMENT OF REAL PROPERTY

Upon written report and oral application of Edward F. Towers, the Chapter 11 trustee herein, in open court on July 9, 1993,upon hearing set by the court to consider issues including the issue of abandonment from the estate of the real property of the debtor commonly known as 1415 Portola Road, Woodside, California, and the Court having found that notice has been sufficient in the circumstances,and good cause appearing therefor, it is hereby

ORDERED, that said application is granted and that the abandonment by the trustee of the real property from the estate be and hereby is authorized and confirmed, and

FURTHER ORDERED that the aforesaid abandonment shall be without determination of any material fact concerning the lien of Investek Financial Corporation, and said abandonment of the real property does not constitute abandonment or waiver of any cause of action which is property of the estate, including, without limitation, any claim for recovery of any money against Investek Financial Corporation upon grounds if any, of violation of usury laws of the

State of California.

Dated: July 9, 1993

s/_____
Dennis Montali, United States
Bankruptcy Judge

Entered in Bankruptcy Docket Jul 9 1993

I certify that the foregoing is a true and correct copy of the original on file in my office. Dated: 7-9-93

s/_____
Paul C.Karney, Clerk of the Court